OAH Docket 7-0320-30106

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Ken Martin, Chair, Minnesota Democratic-Farmer-Labor Party,

Complainant,

v.

Republican Party of Minnesota,

Respondent.

PROBABLE CAUSE ORDER

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge (ALJ) Richard C. Luis on November 2, 2012. This matter was convened to consider a campaign complaint filed under the Fair Campaign Practices Act by the Minnesota Democratic Farmer Labor (DFL) Party on October 26, 2012. The probable cause hearing was conducted by telephone conference call. The probable cause record closed at the conclusion of the hearing on November 2, 2012.

David J. Zoll, Attorney at Law, Lockridge Grindal Nauen, PLLP, appeared on behalf of Ken Martin, Chair, Minnesota DFL Party (Complainant).

R. Reid LeBeau II, Attorney at Law, Jacobson Buffalo, appeared on behalf of the Republican Party of Minnesota (Respondent).

Based upon the record and all the proceedings in this matter, and for the reasons set forth in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED THAT:

1. There is probable cause to believe that Respondent Republican Party of Minnesota violated Minn. Stat. § 211B.06 by disseminating false campaign material regarding Kent Eken, the DFL candidate for the Minnesota Senate District 4 seat.

2. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges, pursuant to Minnesota Statute § 211B.35.

3. Should the Parties decide that this matter may be submitted to the assigned Panel of Judges based on this Order and the record created at the Probable Cause hearing and subsequent filings, without an evidentiary hearing, they should notify the undersigned Administrative Law Judge by **4:30 p.m.** on **Monday, November 12, 2012**. If both Parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing in the near future.

Dated: November 7, 2012

s/Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

The Complaint alleges that on or about October 20, 2012, the Republican Party of Minnesota prepared and disseminated campaign material that falsely claimed that Kent Eken, the DFL's candidate for Senate District 4, voted to raise the fee paid by senior citizens for nursing home care when he was in the House of Representatives.[1] The various pieces of campaign literature paid for by the Republican Party and attached to the Complaint state specifically that Kent Eken "voted to raise the 'granny tax' – the fee paid by senior citizens for nursing home care – by 17 percent."[2] The campaign material cites to House File 2614 of the 86th Legislative Session in support of this statement.

The Complainant asserts that when Mr. Eken was a member of the Minnesota House during the 86th Legislative Session, Senate File 2337, the companion to House File 2614, proposed increasing the nursing home surcharge from $2,815 to $3,400.[3] The House did not concur with Senate File 2337 and the bills were sent to a Conference Committee. The Conference Committee Report that Mr. Eken voted on in the final passage of House File 2614 did not include the provision increasing the nursing home surcharge.[4]

The Complaint argues that the Republican Party of Minnesota's statement on campaign material that Mr. Eken voted to raise the fee paid by senior citizens for nursing home care by voting for House File 2614 is false and that the Republican Party knew the statement was false at the time it communicated it or it made the statement with a reckless disregard of whether it was false. The Complaint also notes that the

[1] *See* Complaint Exhibits A-C.
[2] *Id*.
[3] The Complaint cites: https://www.revisor.mn.gov/bin/bldbill.php?bill=S2337.2.html&session=ls86. at (40.30-40.31).
[4] The Complaint cites: http://www.house.leg.state.mn.us/cco/journals/2009-10/J0512103pt2.htm#12884.

Republican Party has admitted the statement was false.[5] The Republican Party distributed a subsequent piece of campaign material that states: "We goofed. Kent Eken did not vote to raise the fee seniors pay for nursing home care. Instead, Eken voted to raise the cost we pay for hospital care and health insurance."[6]

Arguments of the Parties

At the probable cause hearing, the Respondent submitted the testimony of Jeff Bakken, the independent contractor hired by the Republican Party to design and prepare the campaign literature pieces at issue. Mr. Bakken acknowledged his error in claiming on the campaign pieces that Mr. Eken voted for the "granny tax," however he maintains that it was an honest mistake on his part and that he did not disseminate the material knowing the claim was false or with reckless disregard as to whether the statement was false. Mr. Bakken insists that when he created the campaign material he believed the claim was true.

Mr. Bakken explained that he researched the history of House File 2614 and saw that the Senate had adopted it, maintained the identical file number, and substituted the language. Mr. Bakken assumed, since the bills had the same file number, that the language in each was identical and that the so-called "granny tax" remained. On or about October 20, 2012, Mr. Bakken became aware that Mr. Eken had stated in a debate that the Republican Party's claim that he voted in favor of the granny tax was false. Mr. Bakken conducted additional research on the bills and discovered that the House and Senate versions went to a conference committee and that the increase in the nursing home fee was dropped. According to Mr. Bakken, his confusion was due to the fact that the House and Senate file numbers were identical. This caused him to assume that the increase in nursing home rates was included in both versions of the bill. Mr. Bakken did not review the language of the bill after it came out of the Conference Committee to make sure that the bill still increased the nursing home fee.

The Respondent disseminated the first piece of campaign material with the erroneous claim that Mr. Eken voted to raise the "granny tax" in September 2012. Mr. Bakken did not discover his error until approximately one month later. Once he realized his mistake, he called the mailing service used by the Respondent and told it to stop mailing the piece. Mr. Bakken's phone call was too late to sop the mailing on October 20, 20212, of another piece of campaign material with the same erroneous claim. However, a similar piece that was intended to be mailed on October 23, 2012 was pulled. Mr. Bakken prepared a new campaign piece that acknowledged the mistake (the "We goofed" piece) and it was mailed on behalf of the Respondent on or about October 27, 2012.

Each piece of campaign material that accused Mr. Eken of voting to raise the "granny tax," and the piece that acknowledged the Respondent's mistake, was mailed to

[5] Complaint Ex. D.
[6] *Id*.

1,500 households in Senate District 4 that the Respondent has identified as potential "swing votes."

Legal Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.[7] If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.[8] A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondent has committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

Fair Campaign Practices Act

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material or paid political advertising with respect to the personal or political character or acts of a candidate. In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of campaign material or advertising that the person knows is false or communicates with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, Section 211B.06 is directed against false statements of specific facts.[9] The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard from *New York Times v. Sullivan*.[10] Based on this standard, the Complainants have the burden at the hearing to show by clear and convincing evidence that the Respondents prepared or

[7] *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).
[8] *Id*. at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. *See, e.g.*, Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the standard for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).
[9] *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); *See, Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).
[10] *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

disseminated the campaign material knowing that it was false or did so with reckless disregard for its truth or falsity.[11]

Analysis

Based on the record presented, the Administrative Law Judge finds that the Complainant has demonstrated probable cause to believe that the Respondent committed a knowing violation of Minn. Stat. § 211B.06 by claiming on campaign material that Mr. Eken voted to raise the nursing home fee.

Based on this record, the Administrative Law Judge finds it is reasonable to require the Respondents to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondent disseminated the false campaign material knowing it was false or with reckless disregard as to whether it was false in violation of Minn. Stat. § 211B.06, and if so, what penalty is appropriate.

As stated in the Order above, should the Parties decide to waive the evidentiary hearing and submit the matter on the record made at the Probable Cause hearing with further written submissions, they must notify the Administrative Law Judge by **4:30 p.m. on Monday, November 12, 2012**.

R.C.L.

[11] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also Riley v. Jankowski,* 713 N.W. 2d 379 (Minn. App.) *review denied* (Minn. 2006).